

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

MICROSOFT CORPORATION,	)	
	)	
Plaintiff,	)	<b>[Filed 6/26/95]</b>
	)	Action No. _____
v.	)	
	)	
ANNE K. BINGAMAN, in her official	)	
in charge of the Antitrust Division of the	)	
United States Department of Justice,	)	
	)	
Defendant.	)	

**MOTION TO STRIKE MICROSOFT'S PETITION  
FOR AN ORDER SETTING ASIDE CIVIL  
INVESTIGATIVE DEMAND NO. 13187**

Defendant hereby respectfully moves to strike Petition Of Microsoft Corporation For An Order Setting Aside Civil Investigative Demand No. 13187, filed with this Court on June 23, 1995.

Respectfully submitted,

\_\_\_\_\_[S]\_\_\_\_\_  
Anne K. Bingaman  
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Attorney

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June 26, 1995

MICROSOFT CORPORATION,

Plaintiff,

v.

ANNE K. BINGAMAN, in her official  
capacity as Assistant Attorney General  
in charge of the Antitrust Division of the  
United States Department of Justice,

Defendant.

**[Filed 6/26/95]**

Action No. \_\_\_\_\_

This memorandum is submitted in support of the United States motion to strike Microsoft's Petition For An Order Setting Aside Civil Investigative Demand No. 13187, which was filed with this Court on Friday, June 23, 1995. Last week, in a follow-up to an on-going investigation, the Government submitted to Microsoft a Civil Investigative Demand (CID) setting out certain interrogatories and requests for production of documents. The cover letter accompanying the CID made two express points: (i) that document production could be deferred or avoided altogether depending on the interrogatory answers; and (ii) that the government was willing to work with Microsoft to the extent Microsoft had any difficulty with the scope or timing of the CID. Discussions with Microsoft promptly ensued, and Microsoft, implicitly acknowledging the relevance of the government's requests, made a proposal (on Thursday night, June 22) as to scope and timing of compliance. Then, without waiting for the government to respond to that proposal, on the very next morning (Friday, June 23) Microsoft filed its petition seeking to

set aside the CID. Microsoft's petition was improper and unnecessarily preterminated ongoing negotiations that were taking place between Microsoft and the government.

As support for this Motion, the government states as follows:

1. As the press has reported, and as Microsoft's Petition and the attached CIDs establish, the Justice Department currently is investigating the state of competition in the market for on-line services, with particular regard to whether and how Microsoft's proposed entry into that market by incorporating copies of its new on-line service, Microsoft Network, in copies of its Windows 95 operating system, will harm competition in that market.

2. The Justice Department notified Microsoft's counsel of this investigation and served its first CID on June 4, 1995. See Exhibit A hereto. Microsoft promptly announced that it would cooperate fully with the investigation, and negotiated and agreed upon a schedule for interrogatory answers and documents to be produced. See Exhibit B hereto, incorporating the terms of Microsoft's agreement to the first CID. The return date on the first CID was June 9, 1995. In discussions with counsel representing the Justice Department, Microsoft sought and received an extension to answer interrogatories until Monday, June 12, 1995, and an extension to produce documents until June 26, 1995. The government raised no objection to either extension and readily changed the due date by agreement with the party, which is the standard course for CIDs.

3. Windows 95 has been announced for release on August 24, 1995. Because of the developing market situation, and the urgency of reaching a conclusion promptly, the government has worked with Microsoft and third parties to understand the most current market facts, and additionally has issued CIDs to a number of original equipment manufacturers ("OEMs"), other on-line service providers, and numerous content providers, all of which responded on a few days notice and promptly, as did Microsoft, to the first CID.

4. A courtesy copy of the Justice Department's second CID was served upon Microsoft on June 19, 1995, both by hand delivery and on its General Counsel by fax. Accompanying the second CID

was a letter from the Assistant Attorney General, attached hereto as Exhibit C, stating that, given the shortness of time, answers to interrogatories only were requested by the return date on the CID, June 23, 1995, and that most of the document production could be postponed until some later time. Microsoft never responded to the letter from the Assistant Attorney General.

5. The Assistant Attorney General and numerous staff met with Microsoft's general counsel and several private attorneys representing Microsoft for several hours during the day of Tuesday, June 20, 1995. No reference was made to the CID served the night before, nor was any objection raised to the time period for responding. The meeting lasted from approximately 10:00 a.m. to 4:00 p.m. with a break for lunch, and many issues concerning the current investigation were discussed, as well as other issues.

6. On Wednesday, June 21, 1995, Microsoft was scheduled to have a conference call to negotiate the government's second request for information, served on June 19, 1995. The Assistant Attorney General called Ms. Debra Vogt, Manager of Litigation for Microsoft, to inform her that minor amendments were being made to clarify the information request, and that two document requests and three additional interrogatories were being added. The Department then faxed the amended CID with the changes in bold letters to Microsoft in the afternoon of June 21, 1995. It was the Department's expectation that, as had been done previously under the first CID, the matter would be negotiated on a reasonable time schedule.

7. On the afternoon of Thursday, June 22, 1995 (after Microsoft requested a one-day delay in conducting discussions concerning the CID), Microsoft's attorneys spoke to the attorney, Reid B. Horwitz, representing the Justice Department for the purpose of negotiating compliance with the second CID. See Declaration of Reid B. Horwitz ("Horwitz Dec'l") ¶ 4-5, attached hereto as Exhibit D. Microsoft did not at any time state that the government was not entitled to this discovery, and indeed given its agreement to the earlier discovery and to the relevance thereof, such an objection would have been ill-founded. Instead, Microsoft agreed to produce all documents requested by July 24, 1995 on a rolling basis, subject to limitations for the search group and the time of the search. Horwitz Dec'l ¶ 6.

Microsoft offered to search the files of five individuals and to limit the search from January 1, 1994 to the date of search. Horwitz Dec'l ¶ 7.

8. With respect to interrogatories, Microsoft agreed to answer fully a large percentage of the interrogatories, and to provide full responses limited to years in certain instances, rather than months, with regard to a number of others. Horwitz Dec'l ¶¶ 8, 10. With respect to a number of other interrogatories, Microsoft agreed to provide answers in a different format.

9. The Department accordingly understood that Microsoft was proposing to answer all document requests, subject to the search group and time limitation, and most of the interrogatories, no later than July 24, 1995. The Department was in the process of considering the timeliness of Microsoft's response, given other issues ongoing in the investigation, when the Assistant Attorney General received an unexpected call from Mr. Richard Urowsky, attorney for Microsoft, stating that he was standing in the chambers of Judge Ward at approximately 9:45 a.m. on the morning of Friday, June 23, 1995, and had filed a petition to set aside the Department's CID. The papers had not been sent to the Department, and the Assistant Attorney General said that, because the Department had no notice and did not know what grounds were specified in the petition, the Department would like a chance to review Microsoft's papers before speaking to the Court directly. A briefing schedule for the Motion was worked out later that day and is incorporated in Mr. Urowsky's letter to Judge Ward. See Exhibit E, attached hereto.

10. On the afternoon of Friday, June 23, 1995, the Department called Mr. Urowsky directly to ask why Microsoft filed the petition, and why the discussions, which were ongoing as of Thursday, June 22, 1995, were abruptly broken off. Mr. Urowsky answered that he had been unable to reach his client, Microsoft, throughout the day on Friday, June 23, 1995, and could not respond to that directly before doing so.

11. Finally, the government today again advised counsel for Microsoft that it was willing to accept compliance with the CID as proposed by Microsoft on June 22, 1995, and as set forth in Mr. Horwitz's attached declaration. Microsoft did not accept the government offer.

## ARGUMENT

Based on these events, it is clear that Microsoft has used the excuse of the return date on the CID of June 23, 1995, (i) to abruptly terminate an established negotiating process under which the Department, just two weeks previously, had willingly extended the return date by two and a half weeks; and (ii) to ignore completely the offer in the Assistant Attorney General's letter, dated June 19, 1995, to suspend any requirement to produce documents until interrogatories were answered. Microsoft, therefore, has seized upon a purported disagreement over the scope and time of the government CID, as to which the parties were in the mist of negotiations, to rush into Court to short-circuit a well-established process for resolving discovery disputes.

Had Microsoft not acted precipitously, it would have concluded, as it should, that there is no dispute at all. The government was prepared to accept, and remains prepared to accept, Microsoft's proposal as made by Microsoft and its attorneys on the afternoon of Thursday, June 22, 1995, to Reid B. Horwitz and as reflected in his Declaration. But Microsoft, by filing papers that do not mention this offer within three business hours of their meeting with Mr. Horwitz, gave the government no practical opportunity to resolve the matter. Microsoft's petition thus violates, at a minimum, the spirit of local rule 3(f) of this Court, which requires parties in discovery disputes to "confer[] with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by the [petition] without the invention of the court." S.D.N.Y. R. 3(f).

The government would note that its efforts to complete discovery in a compressed and limited time frame is intended to benefit Microsoft. The government has worked tirelessly to ensure that its investigation accommodates not only Microsoft's marketing efforts with respect to its Windows 95 product, but also third parties who will sell that product and associated products. By refusing to produce until July 24, 1995, documents that, through its June 2, 1995 offer, Microsoft conceded are relevant, Microsoft now appears to have chosen to delay substantially completion of the investigation.

The government's investigation is continuing. The issues under investigation and the parties who have complied willingly include most parties in the industry, including many OEMs and content providers -- but not Microsoft. Because Windows 95 is Microsoft's product, and it is Microsoft's plan to bundle a product in a competitive, adjacent market with its monopoly operating system, it is Microsoft, even more than other parties, that should be working expeditiously to aid the Department to reach a conclusion as promptly as possible.

In conclusion, Microsoft's petition is a tempest in a teapot, raising a matter that can and should be resolved by the parties without the need to resort to intervention by this Court. This Court need not concern itself with mundane discovery disputes that were effectively worked out before Microsoft rushed into Court with a precipitous, unnecessary, and improper petition.

### **CONCLUSION**

The United States' motion to strike should be granted..

Respectfully submitted,

\_\_\_\_\_[S]\_\_\_\_\_  
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